United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 888

Case No. 978: SOOKIA

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Julio Barboza; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 15 May 1997, Bashir Ahmad Sookia, a former staff member of the International Maritime Organization (hereinafter referred to as IMO), filed an application requesting the Tribunal, to order, inter alia:

"1) Rescission of the ... termination of his employment ...

OR

Payment of the sum of £300,000 in lieu [thereof].

2) Specific performance of Respondent's obligations under staff regulation 9.3(b) of the Staff Regulations and Staff Rules.

3) Payment of the sum of £50,000 as compensation for the injury sustained."

Whereas the Respondent filed his answer on 19 December 1997;

Whereas the Applicant filed written observations on 28 January 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 3 April 1978, on a fixed-term appointment at the G-2, step I level, as a Messenger in the Administrative Division, Common Services Section. His appointment was extended successively until 1 July 1979, when the Applicant was granted a probationary appointment. On 29 October 1980, his appointment was converted to a regular appointment, and on 1 August 1981, he was promoted to the G-4, step I level, as a Mailing Clerk.

In December 1988, the Applicant was allegedly involved in an altercation at an office party in which the Chief, Office of General Services, was allegedly assaulted. A disciplinary inquiry was undertaken but it resulted in no formal action.

On 10 November 1989, the Head of Personnel Section informed the Applicant, "that the Secretary-General has decided to move you from the Central Registry, Office of General Services to the TCD [Technical Co-operation Division] Registry, pending further arrangements". In a memorandum dated 18 January 1990, the Applicant requested the Secretary-General to review his situation, stating "it would only be fair to send me back to my old job as Mailing Clerk which I am settled in." In a reply dated 31 January 1990, the Head of Personnel Section informed the Applicant, "I am writing to confirm that the Secretary-General has decided to second you, with immediate effect, to the TCD Registry until further notice." From 1 May 1991 to October 1992, the Applicant served as Mailing Clerk in the TCD Registry.

An exchange of correspondence ensued between the Applicant and the Respondent concerning the Applicant's placement and performance. On 29 March 1993, the Applicant wrote to the Secretary-General, protesting his removal from his post without an alternative suitable post. On 18 June 1993, the Director of Administration informed the Applicant that the Secretary-General had decided to transfer him to the post of Inventory Clerk, at the G-4

level, in the Office of General Services, Administrative Division, with effect from 1 July 1993. In a reply dated 30 June 1993, the Applicant stated: "I will not take the post of Inventory Clerk ..."

On 20 August 1993, the Applicant informed the Director of Administration that he would accept the post of Inventory Clerk, as of 1 September 1993, "as a temporary alternative ..." He assumed the post on that date.

On 3 September 1993, the Applicant requested the Director of Administration to confirm the decision to remove him from the post of Mail Clerk and appoint him to the post of Inventory Clerk. On the same date, he wrote to the Secretary-General, and lodged an appeal with the Joint Appeals Board (JAB) against that decision.

On 12 October 1994, the JAB submitted its report to the Secretary-General. It recommended that:

> "...
>
> 7. Under the circumstances the Board strongly believes that [the Applicant] could not continue to be gainfully employed and some form of separation should be negotiated to save him and the Organization further aggravation. In view of the time that has elapsed since this matter began, the Board feels that a figure closer to the £50,000 claimed than the £20,000 originally offered might be appropriate."

On 21 November 1994, the Secretary-General transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

> "You will note that the JAB found that the transfer of your post was well within my competence and that the JAB does not support you in your other claims.
>
> Finally, I can confirm that my decision regarding the recovery of your salary, for the months of July and August 1993, stands."

The Applicant lodged an appeal with the Administrative Tribunal against this decision.

A note for the file dated 24 April 1995, recorded the content of discussions held at a meeting on 24 April 1995, between the Director of Administration, the Chief of the Office of General Services and the Applicant in which the Director of Administration restated the Administration's offer of an agreed termination under which the Applicant would "be given the **maximum termination benefit allowed under staff regulation 9.3(b) and staff rule 109.2(a), i.e., one year salary plus 50 per cent and three months pay in lieu of Notice**." The Applicant was asked to inform the Head of Personnel Section, in writing, by 1 May 1995, whether he accepted these terms. Failing to do so would be considered as his having rejected them. In that case, the Organization would have "no option but to formally **notify him of termination of his appointment under staff regulation 9.1(c) in which case his benefits would be one year's salary and three months Notice - commencing 1 May 1995**."

On 25 April 1995, the Director, Administrative Division, wrote to the Applicant as follows:

> "... The Organization is still prepared to offer you an agreed termination in accordance with the last sentence of staff regulation 9.1(a) and would give favourable consideration to giving the maximum indemnity available under staff regulation 9.3(b) i.e. 12 months pensionable remuneration less staff assessment plus 50 per cent. It is considered that you have had ample time since 15 March to make up your mind and, if your consent to an agreed termination is not forthcoming by 1 May 1995 the three months' notice required under staff rule 109.2(a) will be effective from that date. This decision has been taken by the Secretary-General in the interest of the good administration of the Organization in accordance with the provisions of Article IX of Staff Regulations."

On 26 May 1995, the Director, Administrative Division, informed the Applicant that his appointment was being terminated and that because he "did not consent to an agreed termination in accordance with the last paragraph of staff regulation 9.1(a), the three months' notice period required took effect from 1 May 1995 ...".

On 29 May 1995, the Applicant wrote to the Director of Administration, the Head of Personnel Section, the Director of the Legal Division and the President of the Staff Association, stating as follows:

> "This is to inform you that your decision to terminate my service with IMO is unlawful and unadministrative and that your 3 months notice of termination is void under regulation 9.1(a) of Article IX of the Staff Regulations and Rules. Regulation 9.1(a) provides that 'the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards required by the Organization, provided that the action is not contested by the staff member concerned.'
>
> You are misusing regulation 9.1(a) of Article IX as I have contested the action taken by you against me in my letter dated 1st May 1995 and I am still contesting it." (Emphasis in original)

In a reply dated 2 June 1995, the Secretary-General stated as follows:

> "I would refer to the memorandum to you of 25 April from the Director, Administrative Division, which attached a note of his meeting with you the previous day. That attachment states clearly in paragraph 4 that failure on your part to accept the offer of an enhanced indemnity payment, on the basis of an agreed termination, would otherwise lead to termination of your appointment under staff regulation 9.1(c)(not 9.1(a)). Neither staff regulation 9.1(a) nor staff regulation 9.1(b) apply to staff employed on the basis of regular contracts; regulation 9.1(a) deals with staff with permanent appointments and 9.1(b) deals with staff on fixed-term contracts. The provisions of staff regulation 9.1(c) applies to other staff members, i.e. staff with regular appointments.
>
> I would recall that the decision to terminate your appointment took place after many months of discussions between you and the Head of Personnel in which you led the Administration to believe that you were prepared to consider an agreed settlement. Similar discussions were held in 1991, as I recall, but were not conclusive. An offer was made to you in good faith by the Administration, reflecting the best termination terms that could be made to a staff member under the Staff Regulations i.e. an enhanced indemnity on the same basis as the

provisions of staff regulation 9.3(b). In the same way, I agreed that you be paid three months' salary in lieu of notice, rather than the statutory one month minimum applicable to staff with regular contracts. The fact that you decided not to agree to the offer and to contest the termination does not make my decision to terminate your appointment unlawful or improper since my action was not taken under paragraph 9.1(a) of the Staff Regulations. My action was taken under the provisions of paragraph 9.1(c) of the Staff Regulations in the interest of the Organization and based on you unsatisfactory services.

In conclusion, I have considered your letter of 29 May 1995 but am unable to agree to change my decision to terminate your appointment."

On 15 September 1995, the Applicant lodged an appeal with the JAB against this decision.

On 2 August 1996, the Tribunal rendered Judgement No. 773, in which it upheld the Secretary-General's decision to transfer the Applicant and to deduct payments from his salary for unauthorized absences from work. (Cf. Judgement No. 773, paras. III and IV).

The JAB adopted its report on the Applicant's 15 September 1995 appeal, concerning his termination, on 25 March 1997. Its findings read as follows:

"...

3. In its memo dated 25 April 1995, the IMO Administration notified [the Applicant] that the Organization is prepared to offer an agreed termination in accordance to staff regulation 9.1(a) and staff regulation 9.3(b);

4. Subsequent memo dated 26 May 1995, IMO issued [the Applicant] with a final memo terminating his appointment in accordance to staff regulation 9.1(a) and will receive compensation in accordance with staff rule 109.2(c);

5. [The Applicant] makes two claims in his report dated 15 September 1995 that he was dismissed in accordance with staff regulation 9.1(c) and no payment has been made in accordance to rule 9.3(b) and Annex 3 and final request for compensation in the order of £350.000;

6. The Board reached the conclusion that staff regulation 9.1(c) is irrelevant to the above case and no payment could have been made since the offer was contested; and

7. The Board concurs with [the] previous ... JAB that [the Applicant] could not continue to be gainfully employed and for the sake of consistency, he should receive payment in accordance to regulation 9.3(b) and staff rule 109.2 as specified in the letter of **25 April 1995** from the Director, Administrative Division to [the Applicant]."

On 24 April 1997, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"It is noted that the JAB recommends that you receive payment in accordance with staff regulation 9.3(b); that is to pay a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable.

In view of the fact that your appointment was terminated under staff regulation 9.1(c), as specified in my letter to you dated 2 June 1995, regulation 9.3(b) is inapplicable. Therefore I have decided not to accept the recommendation of the JAB for payment in accordance with regulation 9.3(b). You have already received payment in accordance with staff rule 199.2[sic]."

On 15 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The termination of the Applicant's employment was not in accordance with the Staff Regulations and Staff Rules and should therefore be rescinded. Although the Respondent now claims that the Applicant was terminated under staff regulation 9.1(c), the Respondent had previously given notice of the Applicant's termination under staff regulation 9.1(a). The termination under staff regulation 9.1(a) is invalid because it

required the Applicant's consent, and the Applicant contested his termination.

2. The Respondent failed to fulfil his obligations under staff regulation 9.3(b) because he did not pay the Applicant the appropriate termination indemnity in accordance with that regulation.

Whereas the Respondent's principal contentions are:

1. The Applicant was terminated solely in the interests of the Organization.

2. Since the relationship between the Applicant and the Organization and between the Applicant and other staff had irreparably broken down, termination was the only option available to the Respondent.

3. The Respondent's attempts to identify suitable positions within the Organization became impossible as Heads of departments reported there were no vacancies for the Applicant.

4. The Applicant's claims related to procedural rather than substantive issues of termination. The termination of the Applicant's appointment was carried out under the proper procedure.

5. The decision to terminate the Applicant's employment was lawful under the Staff Regulations and Rules.

6. The Applicant is not entitled to any payments other than those already accepted by the Applicant.

7. The Applicant is not entitled to any specific performance of any obligations under regulation 9.3(b) of the Staff Regulations and Rules.

8. The Applicant has not sustained any injury and is therefore not entitled to any compensation.

The Tribunal, having deliberated from 9 July to 4 August 1998, now pronounces the following judgement:

I. The Applicant was the holder of a regular appointment, as defined under rule 104.4 of the IMO Staff Rules. The Applicant and the Respondent engaged in several discussions concerning a possible agreed termination of the Applicant's appointment. By memorandum dated 25 April 1995, the Director, Administrative Division, transmitted to the Applicant the Respondent's final offer, which consisted of a termination in accordance with staff regulation 9.1(a) and "favourable consideration to giving the maximum indemnity available under staff regulation 9.3 (b), i.e., 12 months pensionable remuneration less staff assessment plus 50 per cent." The Director, Administrative Division further explained that if the Applicant did not accept the offer by 1 May 1995, the Respondent would terminate the Applicant's appointment "in the interest of the good administration of the Organization in accordance with the provisions of Article IX of Staff Regulations". The Applicant did not accept. By memorandum dated 26 May 1995, the Respondent informed the Applicant that his appointment would be terminated.

II. The termination of regular appointments, such as that of the Applicant, is governed by IMO staff regulation 9.1(c), which provides as follows:

> "In the case of all other staff members [i.e., other than permanent staff members] ..., the Secretary General may, at any time terminate the appointment, if, in the Secretary General's opinion, such action would be in the interest of the Organization."

The notice period and compensation for termination of a regular appointment are governed by staff regulation 9.3(a) and staff rule 109.2(b) . Under staff rule 109.2 (b), a minimum of thirty days' written notice is required. The notice period may be substituted

by compensation in the amount the staff member would have received had the date of termination been at the end of the notice period. In the present case, the Respondent decided to give the Applicant a three-month notice period commencing 1 May 1995. In the termination letter dated 26 May 1995, the Respondent informed the Applicant that he would not be required to work beyond 31 May 1995, and that he would therefore receive compensation in lieu of notice for the last two months of such notice period. As compensation, the Applicant was informed that he would be paid "in accordance with staff regulation 9.3(b) and annex 3 to the Staff Regulations ... 12 (twelve) months of pensionable remuneration less staff assessment."

III. The Applicant bases his case on the Administration's decision to use a method of termination normally applicable only to staff members with a permanent appointment. The Administration partially corrected that erroneous decision when it applied staff rule 9.1(c) instead of 9.1(a), and terminated the Applicant "in the the interest of the Organization".

IV. The JAB found, however, "that staff regulation 9.1.(c) is irrelevant to the above case and no payment could have been made since the offer was contested", apparently because the original offer was made "in accordance to staff regulation 9.1(a) and staff regulation 9.3(b)." The JAB concluded that "for the sake of consistency, [the Applicant] should receive payment in accordance to regulation 9.3 (b) and staff rule 109.2 as specified in the letter of 25 April 1995 from the Director, Administrative Division to [the Applicant]". It appears that the JAB considered the Respondent's offer to the Applicant, which would have given the Applicant more favourable treatment than was required under the rules, as having in some way bound the Respondent even after the Applicant rejected the offer of agreed termination.

V. The Tribunal is of the view that because the Applicant was a holder of a regular appointment, staff regulation 9.1 (c) is strictly applicable in this case. The Tribunal fails to understand why the JAB purports to base its conclusion on "consistency". The Respondent's initial offer to apply terms that were more favourable than what the rules require for holders of regular appointments, in no way changed the nature of the Applicant's appointment. The Applicant's failure to accept that offer permitted the Respondent to terminate his appointment, without his consent, in the interest of the organization, as provided under staff regulation 9.1(c), governing termination for holders of regular appointments. The Tribunal finds no inconsistency in the Respondent's decision not to abide by the terms of the agreed termination that the Applicant rejected.

VI. The Tribunal takes note that both panels of the JAB involved in this case concurred that the separation of the Applicant from his post was in the interest of both the Applicant and the Respondent, as both JAB panels concluded that the Applicant "could not continue to be gainfully employed".

VII. The Applicant received exactly what was due him and more. He received the termination indemnity to which he was entitled under Annex 3 to the Staff Rules and Regulations. In addition, although he was only entitled to thirty days' notice of termination, he was given three months' notice, two months of which were paid to him as compensation in lieu of notice. Thus, he received two months' additional pay without being required to work.

VIII. For the foregoing reasons, the Applicant's pleas are rejected in their entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

Geneva, 4 August 1998

R. Maria VICIEN MILBURN
Executive Secretary